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Before the
Federal Communications Commission
Washington, DC 20554

In the Matter	)	
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GTE CORP.	)	
	)	
Transferor,	)	
	)	
and	)	**CC Docket No. 98-184**
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BELL ATLANTIC CORP.	)	
	)	
Transferee,	)	
	)	
For Consent to Transfer of Control	)	

COMMENTS OF AT&T CORP. ON APPLICANTS' REVISIONS TO PROPOSED MERGER CONDITIONS

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Pursuant to the Public Notice issued by the Commission on April 28, 2000, AT&T Corp. ("AT&T") respectfully submits its comments on the additional filing submitted by Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") (collectively "Applicants") on the revised merger conditions that Applicants submitted on April 14, 2000. *See* Letter of Michael E. Glover, Bell Atlantic, to Magalie Roman Salas (Apr. 14, 2000) ("Revised Conditions *Ex Parte*").[1]

INTRODUCTION AND SUMMARY

When Applicants initially proposed conditions for their merger, AT&T pointed out that discussion of merger conditions were potentially beside the point because, in light of their planned treatment of GTE's interLATA assets, Applicants had not yet made a proposal under which it

[1] The Commission's Public Notice also sought comment on Applicants' proposed treatment of Genuity, a subsidiary of GTE that provides interLATA voice and data services. AT&T is addressing that aspect of Applicants' filings in separate comments filed concurrently.

would be lawful to approve the merger. *See* Opposition of AT&T Corp. To Applicants' Supp. Filing and Renewal of AT&T's Pet. To Deny, at 1 (March 1, 2000) ("AT&T Supp. Comments"). As AT&T's other filing today shows, that is still the case. Likewise, even apart from the interLATA issue, AT&T demonstrated that no set of conditions could adequately reduce the impact of the severe anticompetitive harms that Applicants' merger presents. *Id.* at 5-23. Again, that also remains true today. And AT&T also showed that Bell Atlantic's record of outright defiance of prior merger conditions meant that imposing conditions here would not, as a practical matter, lead to pro-competitive benefits, but instead would be merely likely to produce additional litigation that would further retard entry into the local territories that Applicants continue to dominate. *Id.* at 23-25. That is likewise still true.

Nonetheless, Applicants have now submitted a revised set of conditions. Revised Conditions *Ex Parte* at 3. The specific conditions proposed, however, remain essentially the same as before. Thus, the revised conditions do not in any meaningful way advance competition, but in significant ways hinder it. *See* AT&T Supp. Comments at 26-36. The revised conditions address only a minimum of the concerns that were raised by the numerous commenters, including AT&T, that objected to Applicants' original conditions. *See id.* To the extent that they have been changed, Applicants' revised conditions are to an even greater extent "patterned closely after those adopted by the Commission in the SBC-Ameritech merger." *See* Revised Conditions *Ex Parte* at 1. But Applicants' "me-too" merger conditions are both ironic and insufficient. They are ironic because the SBC-Ameritech conditions were "designed to address potential public interest

harms *specific* to th[at] merger,"[2] yet Applicants have repeatedly claimed that this merger is "drastically different" from that merger. Reply of Bell Atlantic and GTE In Support of their Supp. Filing, at 1 (March 16, 2000) ("BA/GTE Supp. Reply"). And they are insufficient because, as AT&T demonstrated, AT&T Supp. Comments at 11-15, 26-28, the SBC-Ameritech merger conditions are not an appropriate guide for conditions in this merger.

Indeed, the revised conditions that Applicants are now proposing are patently unlawful and represent a step backwards. In Part I of these comments, AT&T demonstrates that the carrier-to-carrier promotions condition and the advanced services condition violate the Communications Act. In particular, the promotions, pursuant to which Applicants will provide limited numbers of unbundled loops at a discount, violate the Act's pricing standard, contain numerous unlawful use restrictions, and discriminate against certain customers and carriers. The advanced services condition is unlawful because it authorizes Applicants to transfer its existing advanced services business to an affiliate – and to maintain a cozy and exclusive relationship with that affiliate – without having that affiliate subject to the obligations of an incumbent LEC. Contrary to the merger conditions, the Act's plain terms would regard such an affiliate as a "successor" to Applicants, and would thereby forbid that type of shell game.[3]

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[2] Memorandum Op. & Order, *Applications of Ameritech Corp., Transferor, and SBC Comm. Inc., Transferee, For Consent to Transfer Control of Corporations*, CC Dkt. No. 98-141, ¶ 357, 14 FCC Rcd. 14712 (Oct. 8, 1999) (emphasis added), *app. pend. sub. nom. Telecomm. Resellers Ass'n v. FCC*, Case No. 99-1441 (D.C. Cir.) ("*SBC-Ameritech Order*").

[3] *See also SBC-Ameritech Order*, Separate Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part, Dissenting in Part, at 1-3 ("many of the conditions are inconsistent with specific sections of the Communications Act," including the separate affiliate condition and the carrier to carrier promotions, which are of "especial legal concern"); Statement of Commissioner Michael Powell, Concurring in Part, Dissenting in Part, at 4 (the merger conditions "risk substantially confusing both the industry and state commissions with respect to rules previously adopted").

Part II of these comments then addresses selected conditions to demonstrate that the Applicants have not revised them in any meaningful, pro-competitive way. Thus, the condition on performance measures fails to address the critical deficiencies in the original condition identified by AT&T and in no event adequately addresses the anticompetitive harms resulting from the merger's removal of yet another large incumbent LEC benchmark. The revised condition on out-of-region entry likewise fails to address the unique harms presented by this merger, particularly the loss of potential LEC-on-LEC competition through Internet facilities, demand for which, GTE itself asserts, is not just growing but "exploding." Finally, the revisions to the OSS condition that require greater uniformity among Applicants' OSS may actually hinder the more critical effort to obtain parity of access to the existing OSS. And because the condition relies on collaborative processes that Applicants can manipulate, it will provide competing carriers not with the ability to use fully functional OSS to compete against Applicants, but more likely with merely another prospect of further litigation with them. For all these reasons, the merger should not be approved with these conditions attached.

I. THE REVISED CONDITIONS VIOLATE THE ACT

A. The Carrier To Carrier Promotions Are Discriminatory

The addition to the proposed conditions of "carrier-to-carrier promotions" does nothing to make this merger pro-competitive, but only more unlawful. Under the promotions – which are virtually identical to those adopted in the *SBC-Ameritech Order* – Applicants would provide a certain number of unbundled loops at discounted rates, which a competitive LEC could use, only in conjunction with its own switch, to offer exclusively POTS services to residential customers

only.[4] Applicants' promotion squarely violates numerous provisions of the Act – including Sections 251(c)(3), 252(d)(1), and 252(i) – because it contravenes Applicants' duty to provide unbundled loops to any requesting carrier, upon the "same terms and conditions" they provide to any other carrier, at "rates . . . that are . . . nondiscriminatory" and that are "based on the cost" of the loop. 47 U.S.C. §§ 251(c)(3), 252(d)(1), 252(i).

Because the promotions would be limited, some competitive LECs will ultimately pay higher rates than others for identical loop facilities – a textbook violation of Applicants' stringent nondiscrimination duty. *See AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("[r]egardless of the carrier's motive, . . . the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services").[5] Here, the promotion would create numerous forms of price discrimination, without even attempting any cost justification.[6] Thus, in the residential market, the prices of unbundled loops for some customers would be higher than the prices for otherwise identical customers. Indeed, even customers located next door to each other might use loops with substantially different prices. That would be

[4] Condition XI, ¶ 35e (discounted loops "shall be used to provide residential telephone exchange service and any associated exchange access service and shall not be used to provide any Advanced Services" and "shall not be purchased or used as part of a UNE Platform or in any other combination"); *see SBC-Ameritech Order* ¶ 391 & App. C, Condition XIV, ¶ 46e.

[5] *See also Local Competition Order* ¶ 859 (noting that the 1996 Act contains even "more stringent" nondiscrimination provisions – like Section 251 – than the prohibition against "unjust and unreasonable" discrimination in Section 202(a)).

[6] Significantly, Applicants themselves refused to provide other promotional waivers of rates by citing the Act's cost-based pricing standard in Section 252(d)(1) and by asserting that such promotions would amount to "subsid[ies]" of the sort that Congress did not "intend[] to encourage" and that would lead to "'competition'" that "would not be efficient." BA/GTE Supp. Reply, App. C, at 20-21. Those same conclusions apply equally here.

discriminatory, and because only one of those loops could possibly correctly reflect TELRIC pricing principles, it also could violate the Act's pricing standard.

Likewise, as a result of Applicants' promotion, the price of unbundled loops for business customers would be higher than the price of loops for certain residential customers. This too would be discriminatory. Indeed, the Commission's regulations plainly require that "[t]he rates that an incumbent LEC assesses for elements *shall not vary* on the basis of the class of customers served by the requesting carrier." 47 C.F.R. § 51.503(c) (emphasis added). In the same way, under the proposed promotions, the price of unbundled loops used in combination with an incumbent LEC switch would be higher than the price of unbundled loops used in combination with a competitive LEC switch. This would be yet another non-cost-based price difference, and its effect would be to discriminate against carriers that are using combinations of network elements. It also would conflict with the Commission's view that it must "establish rules that will ensure that all pro-competitive entry strategies may be explored" and then let "the market," and not "regulation" determine which succeeds. *Local Competition Order* ¶ 12.

Furthermore, because of the discount, the prices for unbundled loops used to provide advanced services would be higher than the prices for certain loops used to provide POTS service. This discriminatory use restriction not only would stand Section 706 on its head, but also would blatantly violate Section 251(c)(3), which allows carriers to use UNEs to provide any "telecommunications service," not merely POTS services. *See* § 251(c)(3); 47 C.F.R. § 51.503(c) ("[t]he rates that an incumbent LEC assesses for elements shall not vary . . . on the type of services that the requesting carrier purchasing such elements uses them to provide"); *id.* §§ 51.307(c); 51.309(a).

Finally, these promotions would squarely violate both the "pick and choose" rule of Section 252(i) of the Act and 47 C.F.R. § 51.809(a) (which implements Section 252(i)). Those provisions require incumbent LECs to "make available any . . . network element" provided under an approved interconnection agreement with one competitive LEC to any other competitive LEC that requests it and to do so "upon the same terms and conditions." *See* 47 U.S.C. § 252(i). Because Applicants' promotion would be limited, however, competitive LECs would not be able to obtain the arrangements given to other competitive LECs "upon the same terms and conditions" once the limits had been reached. The fact that this promotion is not required by the Act is irrelevant. As the state commissions have held, the requirements of Section 252(i) apply to these types of arrangements and side deals, including those that are not affirmatively required to be made available at all.[7] The nondiscrimination principle, which is the basis for Section 252(i), prohibits carriers from conferring special benefits on some customers and not others.[8]

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[7] *See* Order, *Approval of the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and the Other Phone Co. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*, Case No. 98-165 (Ky. PSC June 30, 1999); Order on Negotiated Interconnection Agreement, *Resale Agreement Between BellSouth Telecommunications, Inc., and the Other Phone Co.*, Docket No. P-55, SUB 114 (N.C. PUC June 23, 1999).

[8] In approving these promotions in the *SBC-Ameritech Order*, ¶¶ 495-96, the Commission did not dispute the discriminatory effects of the promotion, but instead made the dubious claim that SBC "voluntarily offer[ed]" the promotions to competitive LECs. Because SBC's "offer" was made via amendments to interconnection agreements, the Commission asserted that Section 252(a)(1) permitted this outright discrimination because negotiated agreements need not comply with Sections 251(b)-(c). Even assuming the Commission could describe these promotions as voluntary, the Act squarely provides that a negotiated agreement cannot be approved where it "discriminates against a telecommunications carrier not a party to an agreement." § 252(e)(5). Congress thus expressly recognized the competitive harm from allowing deviations – like the promotions here – from the nondiscrimination principles that "lie[] at the heart of the . . . Communications Act." *AT&T*, 524 U.S. at 223.

B. The Proposed Advanced Services Affiliate Is A Successor to BA/GTE

Condition I also violates the Act because it would authorize Applicants to create an affiliate to provide advanced services that, merely by following certain separation requirements, "shall not be deemed a successor or assign" to Applicants. *See* Condition I, ¶ 3. Because a "successor or assign" to an incumbent LEC like Bell Atlantic or GTE is defined as an incumbent LEC, *see* 47 U.S.C. § 251(h), the proposed condition purports to excuse Applicants' data affiliate from its unbundling, resale and all other duties that the Act places on an incumbent carrier.

There is no basis in this proceeding for the Commission to conclude that a proposed data affiliate of Applicants would not be a successor or assign to the Applicants. At the outset, there is simply no evidence in the record about any advanced services affiliate, and deciding the question of successorship – which the Commission has found to be "ultimately fact-based"[9] – on such a record would plainly be arbitrary and capricious. But more fundamentally, the very terms of the merger conditions that authorize the data affiliate and that purport to excuse it from its obligations as an incumbent LEC unquestionably confirm that any such affiliate must be deemed as a successor to Applicants. Pursuant to the conditions, Applicants would shift, virtually wholesale, their pre-existing advanced services line of business to this affiliate. Further, to accomplish this sleight-of-hand, those conditions would expressly permit massive transfers of assets and employees from Applicants to the affiliate – on a discriminatory basis – and would continue to

[9] *SBC-Ameritech Order* ¶ 454 (citing *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 264 n.9 (1974)). In the *SBC-Ameritech Order*, the merger condition approved by the Commission created only a rebuttable presumption that SBC's affiliate would not be a successor or assign. *Id.* ¶ 458. Although that conclusion too is improper, Applicants' merger condition is doubly unlawful because it requires the Commission to make a legal determination without the development of any factual record that could support its conclusion. *See, e.g.*, BA/GTE Supp. Reply, App. C at 6 ("The details" of asset and personnel transfers "have yet to be worked out").

allow substantial integration going forward. Under these circumstances, any advanced services affiliate would undoubtedly be Applicants' "successor or assign" – and therefore an incumbent LEC.

Section 251(h) broadly defines "incumbent local exchange carrier" to include not merely local carriers existing in 1996, but also any entity that becomes a "successor or assign" of such carriers. 47 U.S.C. § 251(h)(1).[10] Given the purposes of Sections 251 and 252, no reasonable interpretation of "successor or assign" could possibly exclude a wholly-owned – and significantly integrated – subsidiary of an incumbent LEC that continues to provide pre-existing local exchange services using facilities, employees and other assets previously owned by and transferred from the incumbent. As the Commission has recognized, *SBC/Ameritech Merger Order* ¶ 454, a company succeeds another where "there is substantial continuity between the enterprises," especially where the "new company has 'acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations.'" *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 43-46 (1987) (quoting *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 184 (1973)).[11]

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[10] Congress also gave the Commission sweeping authority to treat "comparable" local exchange carriers as incumbents, 47 U.S.C. § 252(h)(2), which is further evidence that Congress intended the restrictions and obligations that apply to incumbents to be applied in a sufficiently flexible manner to accomplish the Act's core purpose of opening local markets to competition by requiring incumbents to afford nondiscriminatory access to their networks.

[11] Under this test, the Supreme Court has examined a number of factors, including "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs . . . ; whether the new entity . . . produces the same products, and basically has the same body of customers." *Fall River Dyeing*, 482 U.S. at 43. These standards were developed under the labor laws, which naturally focus on employer-employee relations, but the Court's examination of the continuity between the two companies is equally applicable to this context.

Under these principles, there would clearly be "substantial continuity" between Applicants and their advanced service affiliate. *Fall River Dyeing*, 482 U.S. at 43. First, the affiliate would "continue[], without interruption or substantial change" Applicants' previous advanced services operations. *Id.* Applicants currently provide advanced services to their customers, and, if their merger is approved, those same operations would then be carried on by the affiliate. Indeed, the proposed conditions contain numerous "transition" provisions that are designed to ensure that the business will operate seamlessly and "without interruption." *Id.*; *see, e.g.*, Condition I, ¶¶ 3c(3), 3d, 3e, 3h, 4n, 6f, 7. Further, pursuant to the gaping exceptions in the revised conditions that allow Applicants to provide joint marketing and other substantial customer care functions on behalf of this allegedly separate affiliate, *id.* ¶¶ 3a, 3b, 4b, 4i, 4j, 4l, 6f, Applicants would likely continue to promote its advanced services in precisely the same manner as they do today.[12] Because the merger conditions permit the affiliate to continue to promote DSL service without *any* (let alone "substantial") change from Applicants' prior operations, and to trumpet to consumers Applicants' advantages as an incumbent, these conditions present a quintessential case for finding successorship.

Second, the revised conditions expressly permit the affiliate to "acquire[] substantial assets" from Applicants, *Fall River Dyeing*, 482 U.S. at 43, including "Advanced Services equipment," "software, customer accounts, initial capital contribution," "real estate,"

[12] This is how SBC has implemented this merger condition. Thus, other than a disclaimer footnote that its DSL service is provided by its advanced services affiliate, SBC's web site proclaims that SBC provides DSL service and urges consumers to buy from "Pacific Bell/Southwestern Bell/Nevada Bell/Ameritech/SNET" because the DSL service is "backed up by years of experience and reliability. . . . [W]e're able to deliver to you high-speed DSL Internet access from a name you know and trust." *See* www.pacbell.com/DSL/content/1,1888,2,00.html ?site_code=SWBT.

"trademarks" and "service marks," and, perhaps most significantly, Applicants' employees. *See* Condition I, ¶¶ 3 & n.4, 3c(3), 3d-g. All of these transfers demonstrate the "substantial continuity" that would make the affiliate Applicants' successor. For example, the affiliate would acquire Applicants' existing customer accounts, and therefore would "basically ha[ve] the same body of customers." *Fall River Dyeing*, 482 U.S. at 43. As for employees and equipment, the merger conditions provide for "an orderly and efficient transfer of personnel and systems" from Applicants to the affiliate by allowing a "Grace Period" during which Applicants may transfer "on an exclusive basis" any "Advanced Services equipment, including supporting facilities and personnel." Condition I, ¶¶ 3c(3), 3e. By acquiring equipment and other assets on exclusive terms directly from Applicants, rather than on the open market, the proposed affiliate would gain the substantial benefits from Applicants' incumbency that mark a successor relationship.[13] The substantial number of employees that the advanced services affiliate would inherit from Applicants is yet another classic indicia of successorship.[14] *See Fall River Dyeing*, 482 U.S. at 43-46; *NLRB* v. *Burns*, 406 U.S. 272, 280-81 (1972) (finding successorship obligations where new company

[13] In *Fall River Dyeing*, the Court found successorship despite the fact that the company "purchased the assets" of its predecessor "on the open market." 482 U.S. at 44 & n.10.

[14] SBC's data affiliate grew at the incredible pace of 400 to 3000 employees in only about 6 months, which strongly suggests that most of the employees of the new affiliate were former SBC employees. *See* Affidavit of Lincoln Brown, submitted by SBC in CC-Dockets 00-4 and 00-65, ¶ 8 (Apr. 5, 2000). Applicants here will likely attempt to do the same, and have even asserted that, despite the plain relevance of the issue to successorship, personnel transfers are "at Bell Atlantic/GTE's discretion" and should not be subject to "regulatory review." BA/GTE Supp. Reply, App. C, at 6 n.3.

hired a majority of predecessor's former employees).[15] For all these reasons, the revised conditions would provide any advanced services affiliate with the classic markings of a successor: a wholesale transfer of assets that allows it to carry on its predecessor's business seamlessly and with all the advantages of the incumbent.

The Commission approved in the *SBC-Ameritech Order* a "rebuttable presumption" that SBC's data affiliate, Advanced Solutions, Inc. ("ASI") would not be deemed a successor or assign. *Id.* ¶ 458; *see id.* ¶¶ 455-76. That conclusion against ASI's successorship was largely based on the Commission's view that ASI was sufficiently separate from SBC and that, in particular, it would adhere to *some* of the requirements of a Section 272 affiliate. *Id.; see* Condition I (attaching similar separation requirements). But that conclusion was flawed, for three reasons, and would be equally unlawful in this proceeding.

First, even strict separation does not reduce in any way the incentive to discriminate in favor of an affiliate.[16] Thus, the anti-discrimination goals that must inform the successorship inquiry cannot be met merely by separating an incumbent LEC from an advanced services affiliate, because the affiliated companies retain a strong incentive to discriminate against their competitors.

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[15] Because the proposed affiliate's employees may be "located within the same buildings" and even on "the same floors" as Applicants' employees, Condition I, ¶ 3g, many of the affiliate's employees would likely remain in the same offices as when they were employees of Applicants. *Cf. Fall River Dyeing*, 482 U.S. at 44 ("[O]f particular significance" to successorship inquiry was "the fact that, from the perspective of the employees, their jobs did not change").

[16] *See, e.g., Second Computer Inquiry*, 77 F.C.C.2d 384, 461-62, ¶¶ 201-05; *see id.* ¶¶ 204-05 (separate subsidiary "does not significantly change the incentives of a firm upon which it is imposed," but "reduces the ability of dominant firms to engage in predation or to do so *without detection*") (emphasis added); *see also Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 771 (1984) ("A parent and its wholly owned subsidiary have a complete unity of purpose. Their objectives are common, not disparate; their general corporate actions are guided by or determined by not two separate consciousnesses, but one").

While separation may be necessary, it is not automatically sufficient to preclude successorship, particularly where, as here, there is no break in continuity.[17]

Second, Section 272 – the Commission's "guide[]" in the *SBC-Ameritech Order* (¶ 455) for establishing the separate affiliate – was never intended to serve as a method of avoiding incumbent LEC status under Section 251(h)(1). Section 272 applies only *after* an incumbent LEC has demonstrated that it has fully implemented all of the unbundling and other obligations of Sections 251 and 271.

Finally, as AT&T has previously shown, the merger conditions approved in the *SBC-Ameritech Order* and that are proposed here are much less stringent even than what is required by Section 272 – and patently insufficient to prevent discrimination.[18] As the Commission itself has noted, the conditions contain numerous exceptions to Section 272 and its separation requirements, including the affiliate's exclusive rights to the incumbent's customer care functions, exclusive use of the incumbent's brand names, exclusive sharing of the incumbent's real estate and office space, use of the incumbent's operation, installation and maintenance ("OI&M") services, temporary exclusive use of the incumbent's network planning, engineering, design and assignment services, the incumbent's exclusive services for one year in receiving and isolating troubles for the

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[17] Indeed, courts have routinely found successorship even where the two companies were in no way affiliated, and thus unquestionably separate. *See Fall River Dyeing*, 482 U.S. at 32, 44-45; *Burns*, 406 U.S. at 274.

[18] *See* Comments of AT&T Corp. on Proposed Conditions, CC Docket 98-141 (July 19, 1999); Comments of AT&T Corp on Bell Atlantic's Advanced Services Affiliate Proposal, CC Docket 99-295 (Dec. 17, 1999) ("AT&T BA-NY *Ex Parte*"); Supplemental Comments of AT&T Corp. In Opposition to SBC's Section 271 Application for Texas, CC Docket 00-65, & Exh. C (Decl. of C. Michael Pfau & Julie S. Chambers ("Pfau/Chambers 271 Decl.")) (filed Apr. 26, 2000); *see also* Comments of AT&T Corp., CC Docket 98-147 (Sept. 25, 1998) (comments on similar advanced services affiliate proposal).

affiliate's customers, and exclusive temporary line sharing with the incumbent. *See SBC-Ameritech Order* ¶ 460; Condition I, ¶¶ 3a, 4e, 4i, 4l, 3f, 3g, 3c, 4n(4), 4h, 4j, 7. The Commission omitted many others as well, such as the merger conditions' express waiver of Section 272(b)(5)'s transaction disclosure requirement, their authorization of billing and collection services, their short sunset, and their weakened audit requirements. *See* AT&T BA-NY *Ex Parte* at 29-33; Pfau/Chambers 271 Decl. ¶¶ 83-89, Condition I, ¶¶ 3i, 3b, 11.

Each of these exceptions permits significant opportunities for an incumbent LEC to act on its incentives to favor its affiliate's advanced services operations. To take just one example, the Commission had previously determined that the requirement in Section 272 that a BOC "operate[] independently" of its affiliates required that they could not "perform operating, installation, and maintenance functions" for each other's facilities.[19] That was because "allowing the same individuals to perform such core [OI&M] functions on the facilities of both entities would create substantial opportunities for improper cost allocation . . . [and] would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitor's." *Id.* ¶ 163 (emphasis added). Nevertheless, the merger conditions would permit Applicants to perform OI&M for an advanced services affiliate on an exclusive basis for the duration of the conditions. *See* AT&T BA-NY Ex Parte at 26-29; Pfau/Chambers 271 Decl. ¶ 87.

In sum, by their own terms the merger conditions demonstrate why any advanced services affiliate must necessarily be deemed a successor to Applicants, and thus an incumbent LEC. The conditions not only would afford such an affiliate with significant and exclusive access to assets

[19] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21905, ¶ 157 (1996).

that allow it to seamlessly continue Applicants' business, but also would ensure that the affiliate can maintain on an ongoing basis a substantially integrated relationship with Applicants, giving those incumbents numerous avenues to discriminate in favor of the affiliate, squarely contrary to the Act's pro-competitive goals.

II. THE REVISED CONDITIONS CONTAIN NO NEW PRO-COMPETITIVE BENEFITS, AND THE FEW CHANGES ASSURE ONLY ADDITIONAL LITIGATION, NOT COMPETITION

A. Performance Measures

Applicants made only limited changes to the proposed condition on performance measures, and none of the changes were directed at the original condition's most glaring weaknesses: its selective adoption of performance measures in a way that could hide Applicants' significant and competitively harmful discrimination. *See* AT&T Supp. Comments at 33-34; *id.* at 34-36 (the incomplete plan in the proposed condition will serve as a *de facto* ceiling in negotiations for interconnection agreements and in state proceedings). Applicants never seriously dispute AT&T's claims, but simply assert that their revised condition is justified because it is "closely parallels" the SBC-Ameritech merger condition. BA/GTE Supp. Reply at 13-14. That answer is patently insufficient, because as AT&T demonstrated, this merger results in the disappearance of yet another unique large incumbent LEC benchmark, a competitive harm that "'increase[s] disproportionately with each additional decline in the number of major incumbent LECs.'" AT&T Supp. Comments at 11-15 (quoting *SBC-Ameritech Order* ¶ 183). It would be arbitrary, therefore, to rely on a performance measures condition that is less stringent (or even equal to) than the one approved for the SBC-Ameritech merger.

B. Out-Of-Region Entry

Applicants also refused to make any substantial changes to their proposed condition on out-of-region entry. *See* Condition XVI. Applicants initially conceded that, because of their "differing business plan" and "need [for] flexibility," they would not agree to meet the out-of-region condition that the Commission applied to SBC (which itself required less than what either SBC or Ameritech could have achieved without merging),[20] and sought to justify their paltry condition by raising once again their baseless assertion that they, unlike BA-NYNEX or SBC-Ameritech, are not potential competitors of one another. *See id.* at 26-27; BA/GTE Supp. Reply at 6-7. AT&T has already demonstrated why this is false, AT&T Supp. Comments at 6-11, 28-29 & Conf. App., and in fact it is now apparent more than ever that GTE believes that it has the ability, if not the will, to compete against Bell Atlantic throughout its territory for traditional voice traffic using Internet facilities. *Id.* at 10. Thus, GTE's Genuity currently uses voice over IP technology to offer traditional services using its Internet backbone facilities and has boasted that it expects this business to be a major source of future earnings. According to Genuity's press statements, "[t]he market is rapidly evolving toward an IP-based converged data and voice network, and the demand for Voice over IP and enhanced IP services is exploding." www.genuity.com/announcements/news/press_release_19991011-01.xml. Particularly because Genuity has significant facilities in Bell Atlantic's territory, it is plainly apparent that, but for the merger, GTE could be competing directly against Bell Atlantic throughout the Northeast for voice traffic. This type of potential competition was not at issue in the SBC-Ameritech merger, and yet

[20] *See* Supplemental Filing of Bell Atlantic and GTE, at 26-28 (Jan. 27, 2000).

nothing in Applicants' proposed conditions even attempts to remedy the losses from such competition.

C. Enhanced OSS and Advanced Services OSS

Condition VI, relating to "enhanced" OSS and OSS for advanced services, has likewise not been changed in any substantial way that will assure that competing LECs will quickly obtain the pro-competitive benefits from nondiscriminatory access to fully functional OSS. To the contrary, in the end, this condition's principal effect will likely be merely to increase the amount of litigation, thereby further slowing down the process of entry into Applicants' local markets. This is precisely what is occurring as a result of collaboratives that competing LECs have engaged in with SBC, and what is likely to be repeated here.

To obtain the "enhanced" OSS and OSS for advanced services that is promised by the revised condition, competing LECs must engage in a collaborative process with Applicants. But the collaborative process in these conditions is flawed, because the conditions afford Applicants significant discretion to act on their considerable incentives to delay implementing the nondiscriminatory access to OSS that competing LECs need to compete.

For example, the "Plan" that Applicants must present for the collaborative regarding, *inter alia*, "an assessment of [Applicants'] existing interfaces and business rules, and [Applicants'] plans for developing and deploying uniform application-to-application interfaced and business rules" (Condition VI, ¶ 19) is not likely to be treated by Applicants as a significant obligation.[21] That is the lesson to be drawn from SBC's recent collaboratives: in the recent OSS collaborative,

[21] Notably, one change in the revised conditions is to extend Applicants' deadline for filing this Plan from 30 to 90 days after the close of the merger. Condition VI, ¶ 18. Applicants offer no public interest justification for such a delay, and it is difficult to imagine that one exists.

competing LECs were prepared to raise and resolve over 200 distinct issues, but SBC arrived without any serious plan or proposal to improve its OSS. Likewise, the recently concluded collaborative regarding advanced services was chaotic because of SBC's complete lack of commitment to any Plan and its cramped view regarding the scope of the collaborative and the merger conditions. As a result, the collaborative ultimately achieved little, if any, progress, with a substantial number of issues still subject to dispute. Those issues will be subject to arbitration, thus further delaying any possible benefits from the collaborative. Nothing in the revised conditions here demonstrates that Applicants' collaboratives will be any different.[22]

As with SBC's merger conditions, the condition proposed here provides Applicants with little incentive to ensure that the collaborative process is quick, productive and pro-competitive, rather than lengthy and litigious. Although the presence of Commission staff at the collaborative may help goad Applicants into undertaking their duties seriously and may prevent Applicants from adopting cramped and unreasonable interpretations of the conditions, nothing in the revised conditions provides for any significant Commission oversight. And at the end of the day, if the collaborative process is not successful, the merger conditions merely require Applicants to arbitrate before an official that *they* appoint. Condition VI, ¶ 21 (arbitration before an arbitrator "nominated by Bell Atlantic/GTE," conducted with the assistance of subject matter experts selected from "a list of three firms supplied by Bell Atlantic/GTE"). This same provision in the SBC collaboratives means that the achievement of pro-competitive benefits from the advanced

[22] In fact, there is every indication that Bell Atlantic's compliance will be worse, because it has already demonstrated that it will not voluntarily implement merger conditions. It has for years refused to abide by the conditions adopted in its merger with NYNEX. AT&T Supp. Comments at 23-25.

services OSS condition may depend upon an arbitration before an SBC-nominated decisionmaker that relies on SBC-approved companies for technical expertise.

The primary change touted by Applicants for Condition VI is that it will now provide for "greater OSS uniformity." Revised Conditions *Ex Parte* at 2. But the revised condition would not in fact produce pro-competitive benefits for two reasons. First, any attempt to achieve even some degree of uniformity among Applicants' OSS may detract from the critical task that Bell Atlantic and GTE must address promptly and without further hesitation: providing competing LECs with nondiscriminatory access to fully operational OSS as they now exist. That is an essential prerequisite to establish the local competition that Congress intended to create. If, in addition to meeting this long overdue goal, Applicants must also devote resources to achieving greater OSS uniformity, there is a substantial risk that competing LECs will be required to wait even longer for parity of access to OSS. Indeed, it has been AT&T's experience that incumbent LECs have attempted to excuse delays in providing operational OSS by invoking efforts to implement greater uniformity. That cannot be permitted, even if greater uniformity must be (temporarily) sacrificed. Unless Applicants provide assurances that the revised condition will not affect current OSS implementation schedules, it will not likely provide competitive benefit.

Second, even if greater uniformity among incumbent LECs' OSS might provide pro-competitive benefits in theory, the revised condition has been drafted so that it would provide, by Applicants' own description, "little benefit." BA/GTE Supp. Reply, App. C., at 20. That is because uniformity among Applicants' OSS will be implemented in only two states, Pennsylvania and Virginia. Condition VI, ¶ 19f. If uniformity among Applicants' OSS is to be achieved, it can be on a larger scale than this – and indeed, Applicants concede that the effort to develop uniform interfaces, including business rules, in those two states entails an "expenditure of most of the same

time and money necessary to do so on a nationwide basis." BA/GTE Supp. Reply at 13. Accordingly, still greater uniformity could apparently be achieved with a relatively small burden on Applicants. Thus, if uniformity among Applicants' OSS is to be achieved through these conditions – and it must be properly implemented over the long term in a manner that builds upon (and does not detract from) existing efforts to obtain access to OSS – it should be a complete uniformity of access across all states.

Respectfully submitted,

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